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PETITION NOT PRINTED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 891 [redacted]

AUSTIN L. WYMAN JR., Court Appointed Counsel for RICHARD ZUNIGA,

Petitioner.

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT IN OPPOSITION.

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INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1-2
Questions Presented	2
Argument	3
Conclusion	7

CITATION OF AUTHORITIES.

Baxton County Court v. West Virginia, 208 U. S. 192	5
Berea College v. Kentucky, 211 U. S. 45	3
Brinkerhoff-Faris Company v. Hill, 281 U. S. 673	6
Consolidated Turnpike Company v. Norfolk & O. V. R. Co., 228 U. S. 326	6
In Ex Parte Lockwood, 154 U. S. 116	7
Liberty Warehouse Company v. Burley Tobacco Growers Co-op, 276 U. S. 71	4
Massachusetts v. Mellon, 262 U. S. 447	6
Radio Station WOW v. Johnson, 326 U. S. 120	6
Tilleston v. Ullman, 318 U. S. 44	4
Zucht v. King, 260 U. S. 174	2, 6

Statutes.

Ch. 38 Sec. 730, Illinois Revised Statutes, 1961	2, 3, 5
28 U. S. C. 1257	1

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OPINION BELOW.

The opinion of the Supreme Court of Illinois is reported as *The People of the State of Illinois* v. *Richard Zuniga*, 31 Ill. 2d 429, 201 N. E. 2d 31 decided September 29, 1964, Rehearing denied November 23, 1964, and reprinted at Appendix 1 of the Petition.

JURISDICTION.

Since the proper raising of a substantial federal question in the state court proceeding is essential to invoke the Jurisdiction of the Supreme Court of the United States under 28 U. S. C. 1257, it is the position of the respondent

that the petition, being substantially defective in this regard, must be denied, *Zucht* v. *King*, 260 U. S. 174.

QUESTIONS PRESENTED.

1. **Does the Petitioner Manifest Sufficient Standing so as to Enable Him to Question the Constitutional Validity of the Illinois Statute (1961 Illinois Revised Statutes Chapter 38 Section 730) on Behalf of Indigent Defendants Generally.**

2. **Has the Petitioner Timely Presented an Alleged Violation of His Rights Under the Fifth Amendment to the United States Constitution, When Such Issue Was Presented for the First Time in a Petition for Rehearing in the Illinois Supreme Court.**

ARGUMENT.

The Supreme Court of Illinois only decided that the petitioner did not possess the requisite standing to constitutionally challenge the statute of the State of Illinois (1961 Illinois Revised Statutes, Chapter 38 Section 730), which limits fees to court appointed counsel in indigent cases. Nowhere in the opinion can there be found an ultimate determination resolving the issue of whether an unconstitutional deprivation of indigent defendant's rights under the Sixth Amendment to The United States Constitution existed. In fact, the decision of the Illinois Supreme Court clearly shows that the constitutional validity of the statute in question was never reached, Appendix A to the Petition. Since the Illinois Supreme Court decision rested solely on an adequate non-federal ground, the petitioner's attempt to gain certiorari should not be countenanced, *Berea College* v. *Kentucky*, 211 U. S. 45, 53.

The petitioner. here, however, seeks to expand the ruling of the Supreme Court of Illinois so as to clear a jurisdictional path through the doors of this Court and force premature determination of the issue he has raised.

It is the position of the respondent that the petitioner lacks the requisite standing to attack the Illinois legislation on the theory that it affects the representation of indigents generally.

The petitioner's Sixth Amendment argument is not bottomed on the contention that the limitation on fees awarded court appointed counsel harmed the defendant he represented, who was acquitted, or him personally, but that the limitation imposed will harm indigent defendants in the future because court appointed counsel will not effectively

protect the rights of the accused on the limited amount of money given them by the Illinois Legislature. It is a well established principle, however, that the party seeking review of a State court decision must show that enforcement of the challenged judgment would deprive it—not another—of some right arising under the constitution or laws of the United States properly asserted below. *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-Op.*, 276 U. S. 71, 88.

The petitioner, however, has not shown that the Illinois legislation is a present and real threat to his rights under the Sixth Amendment to the United States Constitution, but only that the legislation poses an ominous threat to the future representation of indigent defendants. A strikingly similar proposition as that advanced by the petitioner was answered adverse to the petitioner's contention in *Tilleston* v. *Ullman*, 318 U. S. 44.

In *Tilleston* v. *Ullman*, 318 U. S. 44, a doctor was not allowed to contest a state statute preventing the use of devices for contraception on the basis that the enforcement of the statute would endanger his patients' lives. The doctor, as the attorney in this case, failed to show that any constitutional rights of his own were violated but only those rights of his patients. The Court, in disposing of the doctor's claim that he had standing to raise the issue of the deprivation of another's constitutional rights, stated at p. 46:

> "We are of the opinion that the proceeding in the state court present no constitutional question which appellant was standing to assert. The sole constitutional attack upon the statutes under the Fourteenth Amendment is confined to their deprivation of life—obviously not appellant's but his patients. There is no allegation or proof that appellant's life is in danger. His patients are not parties to this proceeding and there is no basis on which we can say that he has

> standing to secure an adjudication of his patients' constitutional right to life which they do not assert in their own behalf."

Nor, can the petitioner avoid the impact of these decisions that he does not possess the requisite standing, by claiming that in his position as an attorney at law and officer of the Court he has a deep concern with the interests of indigent defendants, and therefore has a right to question the propriety of the Illinois legislation insofar as it deprives indigent defendants of their Sixth Amendment rights to the United States Constitution. The petitioner's contention has been previously laid to rest by this Court in *Baxton County Court* v. *West Virginia*, 208 U. S. 192, 197-8, where this Court held that the interest of a petitioner must be of a personal and not of an official nature.

The petitioner is not the only effective adversary, as he claims, to test the constitutionality of the Illinois legislation insofar as it allegedly deprives indigent defendants of their right to effective counsel.

In Illinois, there will be numerous cases on appeal where an indigent defendant had court appointed counsel in the trial court and if in any particular case the indigent defendant felt he was inadequately represented by counsel, by the limitation imposed on counsel by chapter 38, section 730, Illinois Revised Statutes, 1961, he will have ample opportunity to raise that question. We cannot argue this case in a vacuum, as the appellee wishes, by stating that the mere fact that the indigent was acquitted has no bearing upon this petition, because the fact that he was acquitted shows that in this particular case the indigent defendant was not harmed by the operation of the statute and was fully afforded his constitutional rights.

To pass upon the validity of the Illinois legislation now would be to make the petitioner's abstract assertions of

possible future injury to indigent defendants, indefinite in nature and degree, the occasion for constitutional decision. Such action by this Court, we submit, would transcend the traditional judicial bounds of this Court.

The Sixth Amendment contention raised by the petitioner is not ripe for this Court's judicial determination because the petitioner has not sustained, nor is he immediately in danger of sustaining some direct injury as a result of the statute's enforcement. (*Massachusetts* v. *Mellon*, 262 U.S. 447, 488.)

The petitioner, in addition to his Sixth Amendment contention, raised for the first time in his petition for rehearing in the Illinois Supreme Court the contention that the fees awarded him pursuant to the Illinois Statute deprived him of his property, as an attorney, without due process of law in violation of the Fifth Amendment to the United States Constitution. The same contention is also alleged before this Court. It is the position of the respondent, however, that this alleged constitutional deprivation to the plaintiff has not been seasonably presented. It is a well accepted rule of this Court that a substantial federal question must have been raised and brought to the State court's attention with fair precision, *Zucht* v. *King*, 260 U.S. 174.

Raising the federal question for the first time in a petition for rehearing addressed to the highest State court is not sufficient, *Radio Station WOW* v. *Johnson* 326 U.S. 120, 128. To have a reviewable judgment under such circumstances, the order denying the petition for rehearing must be more than a cursory recitation, as it was in this case, that the Petition was denied, *Consolidated Turnpike Co.* v. *Norfolk & O.V.R. Co.*, 228 U.S. 326, 333-4.

The petitioner had ample opportunity to raise his Fifth Amendment allegation and the Illinois Supreme Court decision did not unexpectedly raise the issue for the first time. See: *Brinkerhoff-Faris Co.* v. *Hills*, 281 U. S. 673.

The petitioner accepted the appointment as counsel by the Court without complaint. The opportunity to complain was never seized by the petitioner until he filed his petition for rehearing in the Illinois Supreme Court. The petitioner, we submit, seized his opportunity too late. Yet, even if the petitioner had been prompt in his complaint, it is well established that the practice of law is not one of those rights protected by the Fourteenth Amendment. *In ex parte Lockwood*, 154 U.S. 116.

In summary, it is the position of the respondent, that under the doctrine of this Court, constitutional adjudication is to be avoided where possible. Therefore, it is obvious that the contention of the petitioner in this case does not manifest sufficient reason to decide the Sixth Amendment contention of the petitioner. Such contention is not ripe for review at this time or under the facts of this case. Further, the petitioner's Fifth Amendment argument, which unlike his other contention is personal to himself, was not timely presented in the Illinois courts, and therefore is not properly before this Court.

CONCLUSION.

For the aforementioned reasons, relator respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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